IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.357 OF 2007
ALONGWITH
NOTICE OF MOTION NO.1092 OF 2007
IN
LONG CAUSE SUIT NO.3353 OF 1986.

Jamnadas Mathradas ..Plaintiff

versus

M/s.Baf Hira Builders ..Respondent.

Anand Talreja for the Plaintiff

Sheeja John i/b. M/s. M.P.Savla & Co. for the defendant No.4.

Coram : S.R.Sathe, JJ.
Dated : 19th June, 2007

P.C.

1. The Original defendant No.4 has taken out this Chamber Summons, and the Original defendant Nos.1 to 3 have taken out the Notice of motion praying that they be allowed to cross examine the plaintiff.

2. The facts giving rise to this Chamber Summons and Notice of Motion are as under:

3. Plaintiff filed suit for specific performance against the defendants. The defendants appeared and opposed the suit claim. The plaintiff filed notice of Motion and claimed interim relief.

However, the same was not granted. Being aggrieved by the same the plaintiff filed appeal, but the same also came to be dismissed.

4. On the pleadings of the parties, issues were framed and on 21.1.2006 the Court directed to place the matter next week for ex-parte. On 3.3.2006, the Court (Coram: V.C.Daga, J.) recorded the examination in chief of the plaintiff. (It appears that prior to that day the plaintiff had filed affidavit of evidence on 30.1.2006). It appears that on 3.3.2006 neither defendants nor their advocates were present and as such there was no cross examination. Plaintiff submitted that he would not examine any more witnesses and filed pursis to that effect. The Court therefore directed that the suit be proceeded for final hearing on the next date.

5. On 12.3.2007, the defendant No.4 filed Chamber summons and stated therein that on 3.3.2006 when the examination in chief of the plaintiff was recorded by the Court the defendants were not aware of the said date and even the advocates of the defendants were not aware of the said date as their

names were not shown on the board inspite of filing their vakalatnama, and as such they were absent on that day. The defendant No.4, therefore, prayed that the defendant No.4 be given a chance to cross examine the plaintiff. The defendant No.4 also submitted that if such opportunity is not given the defendant No.4 would suffer irreparable loss. In notice of motion defendants 1 to 3 raised similar grounds.

6. The plaintiff filed affidavit in reply to the said notice and opposed the chamber summons and the notice of motion. The plaintiff contended that there is no provision in law for setting aside the order regarding "NO Cross" passed by the Court on 3.3.2006 and as such the chamber summons and the notice of motion are liable to be dismissed. Besides this, the plaintiff also contended that the defendant filed the chamber summons after 374 days from the date of passing the order of ‘No Cross’ and as such the Chamber Summons is time barred. He also contended that notice of motion is not within time and as such time barred. The plaintiff also contended that the plaintiff is a senior citizen, aged about 74 years and suffering from heart disease

and as such he has been put to great inconvenience and hence the defendants be directed to pay heavy cost to the plaintiff.

7. I have heard the learned advocates for both sides. The only point for my consideration at this stage is whether the defendants are to be allowed to cross examine the plaintiff. My answer is in the affirmative for the following reasons.

8. Firstly, it must be noted that this is not a case where the defendants had not at all contested the suit and that they were negligent in defending the suit. The material on record clearly goes to show that the defendant No.4 had strongly opposed the suit by filing the written statement and then on the pleading of the parties, Court has framed issues. The defendant No.4 has stated in his affidavit that on 3.3.2006 when the examination in chief of the plaintiff was recorded and further remark was passed "No Cross", the defendant No.4 was unaware of the said date and the names of their advocates were also not shown on the board dated 3.3.2006. When such is the position, it cannot be said that there was any fault on the part of the

defendant or their advocates in not remaining present. It is not the case of the plaintiff that the averment made by the defendant in this behalf in his affidavit is incorrect. So, it must be held that the defendant has in fact given a justifiable reason for not remaining present on that day and has shown the circumstances under which the order "No Cross" was passed.

9. It is needless to say that it is always desirable to give proper opportunity to both the parties to put forward their case before the Court, once both the parties have filed their pleadings. If such opportunity is not given and the party to the suit is prohibited from adducing any evidence or cross examining the other side then there is every likelihood that even if the matter is decided in favour of the plaintiff, the same is likely to be remanded only with a view to give fair opportunity to the other side. So, considering all these aspects, I have no hesitation to hold that this is a fit case where opportunity has to be given to the defendant to cross examine the plaintiff.

10. The learned advocate for the defendant has

drawn my attention to a case **Sultan Saleh Bin Omer vs. Vijayachand Sirimal, AIR 1966 A.P.295** wherein his Lordship has observed "An opportunity to party to recall witness for examination, cross examination, or re-examination cannot be said to be governed by Order 18 Rule 17 of C.P.C. If circumstances warrant, Court can grant such opportunity under Section 151 of C.P.C." Similar view is taken in the case **Chairman Notified Area Council, Bhanjanagar vs. Kudini Lingaraju Patra AIR 1974 Orissa, 17.** Thus, having regard to the facts of the case, I have no hesitation to hold that the facts and circumstances of the case warrant to give an opportunity to the defendants to cross examine the plaintiff. This is essential in the interest of justice.

11. It is true that there has been considerable delay in filing the chamber summons and the notice of motion. The defendants have not given the detail explanation about the said delay. However, considering the fact that no substantial progress has been made in the case even after 3.3.2006, I think that merely because there is delay in filing the Chamber Summons and the notice of motion, the

same cannot be rejected or dismissed. Hence I pass the following order

ORDER

1. The defendants 1 to 4 are allowed to cross examine the plaintiff on deposit of costs of Rs.2,500/- each, in the Court within eight days from today, for being paid to the plaintiff.

2. Payment of costs is a condition precedent for further defence of the suit.

3. Costs, if paid as above, the matter be placed for cross examination by the Plaintiff on 4.7.2007.

4. Notice of Motion and Chamber Summons are disposed of accordingly.

(S.R.Sathe, J.)